

No. 15-1167

IN THE
Supreme Court of the United States

EDWARD J. O'BANNON, JR., *et al.*,
on behalf of themselves and all others similarly situated,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

GLENN D. POMERANTZ
KELLY M. KLAUS
MUNGER, TOLLES &
OLSON LLP
560 Mission St., 27th Floor
San Francisco, CA 94105

GREGORY L. CURTNER
ROBERT J. WIERENGA
SCHIFF HARDIN LLP
350 Main St., Suite 210
Ann Arbor, MI 48104

SETH P. WAXMAN
Counsel of Record
LEON GREENFIELD
DANIEL S. VOLCHOK
DAVID M. LEHN
MATTHEW GUARNIERI
ARI J. SAVITZKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

CORPORATE DISCLOSURE STATEMENT

The National Collegiate Athletic Association is an unincorporated, non-profit membership association composed of over 1,200 member schools and conferences. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES	v
STATEMENT	1
A. The NCAA And Amateurism In Col- lege Sports	1
B. Procedural History	2
REASONS FOR DENYING THE PETITION	7
I. THE NINTH CIRCUIT’S RULING REGARDING THE PROCOMPETITIVE EFFECTS OF THE CHALLENGED NCAA RULES DOES NOT WARRANT REVIEW	7
A. Petitioners Mischaracterize The Deci- sion Below	8
B. The Court of Appeals’ Procompetitive- Effects Ruling Is Correct And Does Not Conflict With Decisions Of This Court Or Other Courts.....	11
II. PETITIONERS’ ARGUMENTS REGARDING THE NINTH CIRCUIT’S LESS-RESTRICTIVE- ALTERNATIVES ANALYSIS, WHICH AD- DRESSED LIABILITY RATHER THAN REME- DY, LACK MERIT	15
A. Petitioners’ Challenges To The Ninth Circuit’s Analysis Of The Above-COA Alternative Were Neither Pressed Nor Passed On Below And Rest On A Mis- characterization Of The Decision.....	16

TABLE OF CONTENTS—Continued

	Page
B. The Outcome Would Have Been The Same Had Petitioners Raised Their Argument Below	18
C. Petitioners’ Burden Arguments Provide No Basis For Review	21
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Agnew v. NCAA</i> , 683 F.3d 328 (7th Cir. 2012).....	25
<i>American Needle, Inc. v. NFL</i> , 560 U.S. 183 (2010)	13
<i>Amoco Production Co. v. Village of Gambell</i> , 480 U.S. 531 (1987)	22
<i>Bhan v. NME Hospitals, Inc.</i> , 909 F.2d 1404 (9th Cir. 1991).....	20
<i>Board of Regents v. NCAA</i> , 707 F.2d 1147 (10th Cir. 1983).....	15
<i>Broadcast Music, Inc. v. CBS, Inc.</i> , 441 U.S. 1 (1979)	13
<i>Chicago Professional Sports Ltd. Partnership v. NBA</i> , 961 F.2d 667 (7th Cir. 1992).....	20
<i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006)	19, 22, 23
<i>International Salt Co. v. United States</i> , 332 U.S. 392 (1947)	22
<i>Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.</i> , 510 U.S. 27 (1993).....	25
<i>Kreuzer v. American Academy of Periodon- tology</i> , 735 F.2d 1479 (D.C. Cir. 1984)	25
<i>La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.</i> , 762 F.3d 867 (9th Cir. 2014).....	19
<i>Law v. NCAA</i> , 134 F.3d 1010 (10th Cir. 1998)	14
<i>Lebron v. National Railroad Passenger Corp.</i> , 513 U.S. 374 (1995)	20

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Leegin Creative Leather Products, Inc. v. PSKS, Inc.</i> , 551 U.S. 877 (2007)	13
<i>Major League Baseball Properties, Inc. v. Salvino, Inc.</i> , 542 F.3d 290 (2d Cir. 2008)	25
<i>National Society of Professional Engineers v. United States</i> , 435 U.S. 679 (1978)	18, 23
<i>NCAA v. Board of Regents of University of Oklahoma</i> , 468 U.S. 85 (1984).....	<i>passim</i>
<i>North American Soccer League v. NFL</i> , 670 F.2d 1249 (2d Cir. 1982).....	25
<i>OBB Personenverkehr AG v. Sachs</i> , 136 S. Ct. 390 (2015)	24
<i>Pennell v. City of San Jose</i> , 485 U.S. 1 (1988)	17
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002)	17
<i>Tanaka v. University of Southern California</i> , 252 F.3d 1059 (9th Cir. 2001)	24
<i>Trabert & Hoeffler, Inc. v. Piaget Watch Corp.</i> , 633 F.2d 477 (7th Cir. 1980)	23
<i>United States v. Brown University</i> , 5 F.3d 658 (3d Cir. 1993)	20
<i>United States v. Hinkson</i> , 585 F.3d 1247 (9th Cir. 2009) (en banc).....	19
<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001)	25
<i>United States v. Ressam</i> , 679 F.3d 1069 (9th Cir. 2012) (en banc).....	19

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. United States Gypsum Co.</i> , 340 U.S. 76 (1950)	18
<i>United States v. Vonn</i> , 535 U.S. 55 (2002)	24
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	17, 24
<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982)	22
<i>Wilk v. American Medical Ass'n</i> , 719 F.2d 207 (7th Cir. 1983).....	25
<i>Wilk v. American Medical Ass'n</i> , 895 F.2d 352 (7th Cir. 1990).....	26

STATUTES AND RULES

15 U.S.C. §26	22
20 U.S.C. §1087ll	2
S. Ct. R. 14.1	20, 25

STATEMENT

A. The NCAA And Amateurism In College Sports

The NCAA was founded in 1905, in response to serious problems caused by inadequate oversight of intercollegiate athletics. Pet. App. 3a. “Since its inception ..., the NCAA has played an important role in the regulation of amateur collegiate sports.” *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984). For example, the NCAA has “promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs.” *Id.* As these quotations indicate, amateurism—the principle that student-athletes are not paid for their athletic participation—has always been a central feature of NCAA-governed college sports. Pet. App. 4a-5a.

Today, the NCAA has “roughly eleven hundred member schools,” “organized into ... Divisions I, II, and III.” Pet. App. 78a. Division I football is further subdivided into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). Pet. App. 79a.

College sports are a popular form of entertainment (and have been for more than a century), and a few of those sports command significant commercial interest. That interest exerts pressures that could undermine the distinct and longstanding nature of college athletics, driving them away from being a scholastic endeavor and towards being a professional one. The NCAA thus remains committed to amateurism, the purpose of which “is to maintain intercollegiate athletics as an integral part of the educational program ... and, by so doing, retain a clear line of demarcation between intercol-

legiate athletics and professional sports.” NCAA C.A. Record Excerpts at ER610; *see also id.* at ER611.¹

Consistent with the amateurism principle, NCAA rules limit participation in NCAA sports to students who are not paid for their athletic participation. To cover their educational expenses, however, Division I student-athletes may “receive institutional financial aid based on athletics ability,” including scholarships. NCAA C.A. ER620. Before 2014, the NCAA limited athletic scholarships to tuition and fees, room and board, and required books. Pet. App. 6a. In 2014, that limit was increased to “cost of attendance,” or COA, a federally defined amount that includes—in addition to the already-allowed tuition and fees, room and board, and required books—“supplies, transportation, and other expenses related to attendance at the institution.” Pet. App. 6a-7a & n.3; *see* 20 U.S.C. §1087ll. “The difference between [the pre-2014 limit] and the cost of attendance is a few thousand dollars at most schools.” Pet. App. 6a n.3.

B. Procedural History

1. Petitioners are a class of current and former FBS football and Division I men’s basketball players. Pet. App. 9a. They alleged that NCAA rules requiring participants in NCAA athletics to be amateurs violated

¹ Petitioners claim (Pet. 9) that the Ninth Circuit “deemed ‘irrelevant’ the NCAA’s ‘historical commitment to amateurism.’” In fact, the court stated that “the district court probably *underestimated* the NCAA’s commitment to amateurism.” Pet. App. 49a (emphasis added); *see also Board of Regents*, 468 U.S. at 120 (noting “the NCAA[’s] ... critical role in the maintenance of a revered tradition of amateurism in college sports”). The court of appeals simply noted that that underestimation was not by itself a basis to disturb the district court’s judgment. Pet. App. 49a.

the Sherman Act. Pet. App. 8a. In particular, petitioners claimed that these rules constituted an unlawful agreement among schools (i.e., NCAA member institutions) not to compensate FBS football and Division I men’s basketball players for the use of their names, images, and likenesses (NILs) in live-game broadcasts, sports-themed videogames, and archival game footage. Pet. App. 76a-77a. The alleged violation did not stem from any NCAA rule specifically prohibiting payment for use of student-athletes’ NILs; no such rule exists. Rather, petitioners complained about a particular application of the NCAA’s general amateurism (i.e., no-pay-for-play) rules.

The district court certified a declaratory and injunctive class but declined to certify a damages class. Pet. App. 8a-9a. Shortly before trial, the named petitioners dismissed their damages claims. Pet. App. 10a.²

2. Following a bench trial, the district court entered judgment for petitioners, ruling that “the challenged NCAA rules unreasonably restrain trade.” Pet. App. 77a.

The court first defined the relevant market as the “college-education” market, “a national market in which NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits.” Pet. App. 129a. Those “unique bundles” consist of “the opportunity to earn a higher education while playing for an FBS football or Division I men’s basketball team.” *Id.* More specifically, the court found, recruits receive payments covering “tuition, fees, room and board, books, certain school supplies,

² Also before trial, petitioners settled with the other defendants, Electronic Arts and the Collegiate Licensing Company. Pet. App. 10a.

tutoring, and academic support services,” as well as “high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences.” Pet. App. 83a. In exchange, schools receive the recruits’ “athletic services[,] ... acquiesce[nce] in the[] ... use of their names, images, and likenesses while they are enrolled,” and agreement to “pay for any other costs of attendance not covered by their” scholarship. Pet. App. 84a.

The court next undertook a detailed rule-of-reason analysis, applying the three-step burden-shifting framework required by Ninth Circuit precedent. The court therefore considered: (1) whether petitioners had proved that the challenged rules had significant anti-competitive effects in the college-education market; (2) if so, whether the NCAA had proved that the rules had procompetitive benefits; and (3) if so, whether petitioners had proved that there was any substantially less restrictive alternative through which those procompetitive benefits could be achieved. *See* Pet. App. 127a-128a (recounting this standard).

After answering the first two questions in the affirmative, Pet. App. 128a-163a—including finding that NCAA amateurism rules enhance consumer interest in college sports and foster integration of student-athletes into their educational setting—the court turned to less restrictive alternatives. The alternative it embraced was for the NCAA to allow schools: (1) to use revenue generated by the use of student-athletes’ NILs to raise the athletic-scholarship limit to cost of attendance and (2) to pay student-athletes (after completion of their athletic eligibility) “limited ... shares” of that revenue above COA. Pet. App. 173a. The court permanently enjoined the NCAA from adopting rules more restric-

tive than this alternative, with the injunction specifying that by “limited ... shares” of NIL revenue, the court meant up to \$5,000 above COA for each year of a student’s athletic participation. Pet. App. 177a-179a, 182a-183a.

3. The Ninth Circuit affirmed in part and vacated in part.

After rejecting several arguments the NCAA advanced for why the district court erred in subjecting the challenged NCAA rules to a detailed rule-of-reason analysis, Pet. App. 22a-40a, the court of appeals addressed the district court’s rule-of-reason analysis, following the same three-step framework that that court had applied. As to the first two steps, the Ninth Circuit “agree[d] with the district court that the compensation rules have a significant anticompetitive effect,” Pet. App. 46a, and found no clear error in the court’s analysis of the rules’ procompetitive effects—although it observed that “the district court probably underestimated the NCAA’s commitment to amateurism,” Pet. App. 49a.³

The court of appeals therefore examined—at “[t]he third step in the Rule of Reason analysis”—whether the district court had identified valid less restrictive

³ Petitioners ignore the Ninth Circuit’s holding “that the NCAA’s compensation rules serve” not only amateurism but also a second “procompetitive purpos[e]: integrating academics with athletics.” Pet. App. 49a-50a; *see also* Pet. App. 117a (district court finding that purpose), 167a (same). The NCAA did not “abandon[]” that second procompetitive effect on appeal. Pet. 6. To the contrary, it argued that the district court’s “failure to credit [that] justification fully was erroneous.” NCAA C.A. Br. 50. In any event, the Ninth Circuit *affirmed* the district court’s ruling regarding integration. Pet. App. 49a-50a. Petitioners cannot wish that holding away.

alternatives, i.e., “reasonable alternatives to the NCAA’s current compensation restrictions.” Pet. App. 51a. The Ninth Circuit explained that to be valid, an alternative must be “substantially” less restrictive of competition (to avoid judicial micromanagement of business decisions), and “‘virtually as effective’ in serving the procompetitive purposes of the NCAA’s current rules, [] ‘without significantly increased cost.’” *Id.* Applying this standard, the court concluded that a rule allowing cash payments above COA was not a valid alternative, based on the “self-evident fact that paying students for their NIL rights will vitiate their amateur status.” Pet. App. 57a; *accord* Pet. App. 56a (“not paying student-athletes is *precisely what makes them amateurs*”). But the court upheld the district court’s ruling that setting the athletic-scholarship limit at COA (again, typically a few thousand dollars above the pre-2014 limit that respondents challenged) was a valid alternative. Pet. App. 52a-55a. The Ninth Circuit accordingly vacated the district court’s judgment and injunction only to the extent they required the NCAA to allow cash payments above COA. Pet. App. 62a-63a.⁴

Chief Judge Thomas concurred in part and dissented in part, stating that he would have affirmed the district court in all respects. Pet. App. 65a-75a.

⁴ In attacking this part of the Ninth Circuit’s ruling, petitioners variously describe the district court’s decision as supported by “overwhelming evidence” or “a wealth of evidence.” Pet. 6, 7. As the court of appeals explained, however, “[m]ost of the evidence ... was addressed to the wrong question.” Pet. App. 57a-58a. “Instead of asking whether making small payments to student-athletes served the same procompetitive purposes as making no payments, the evidence ... went to a different question: Would the collegiate sports market be better off if the NCAA made small payments or big payments?” Pet. App. 58a.

4. Petitioners filed a petition for rehearing en banc. The Ninth Circuit denied the petition without any of the court's 28 active judges requesting a vote. Pet. App. 186a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S RULING REGARDING THE PROCOMPETITIVE EFFECTS OF THE CHALLENGED NCAA RULES DOES NOT WARRANT REVIEW

Petitioners first challenge (Pet. 13-20) the Ninth Circuit's conclusion that the NCAA amateurism rules at issue have legitimate procompetitive benefits. In particular, petitioners assert that the court of appeals improperly "accepted the NCAA's asserted interest in 'amateurism' as a legitimate procompetitive justification," and thus "remov[ed] consumer interest from the [rule-of-reason] framework." Pet. 13, 14. That analysis was erroneous, petitioners contend, because "'amateurism' is the same thing as the restraint," and hence the court effectively approved "the suppression of competition as a procompetitive effect." *Id.*

This question does not warrant the Court's review because it rests on a mischaracterization of the Ninth Circuit's decision. What the court of appeals actually concluded was precisely what this Court concluded in *Board of Regents*: that the NCAA's amateurism rules, by making available a "product" that is different from professional sports, have the procompetitive benefit of expanding consumer choice and boosting consumer demand for collegiate athletics. That ruling was correct and does not conflict with any decision of this Court or other circuits.

A. Petitioners Mischaracterize The Decision Below

Contrary to petitioners' assertion, the court of appeals did not treat amateurism itself as a procompetitive benefit. It did not, that is, hold "that 'amateurism' justified the non-payment of college athletes [simply] because 'not paying student athletes is precisely what makes them amateurs.'" Pet. 10 (quoting Pet. App. 56). Indeed, the court plainly distinguished amateurism from procompetitive benefits, stating that "the NCAA ... need[ed] to show that amateurism *brings about* some procompetitive effect in order to justify it under the antitrust laws." Pet. App. 49a (emphasis altered) (citing *Board of Regents*, 468 U.S. at 101-102 & n.23). The court then affirmed the district court's determination that "there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers." *Id.*

The basis for that affirmance was the Ninth Circuit's conclusion that a "restraint that broadens choices can be procompetitive," Pet. App. 47a, and that the challenged NCAA rules do precisely that. Rules prohibiting student-athletes from "receiv[ing] NIL cash payments untethered to their education expenses," the court explained, "differentiate[]" college sports "from professional sports." Pet. App. 55a, 57a (quoting *Board of Regents*, 468 U.S. at 102).

This explanation was consistent with—indeed, drawn directly from—*Board of Regents*, where this Court stated that the NCAA's commitment to amateurism "differentiates [college sports] from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor

league baseball.” 468 U.S. at 101-102, *quoted in* Pet. App. 50a-51a. Thus, this Court elaborated, amateurism “can be viewed as procompetitive” because it “widen[s] consumer choice” by “enabl[ing] a product to be marketed which might otherwise be unavailable.” *Id.* at 102, *quoted in part in* Pet. App. 51a. That procompetitive benefit, the Ninth Circuit rightly concluded here, would be lost if players were no longer amateurs, as the NCAA would “transitio[n] from its ‘particular brand of [college sports]’ to minor league status.” Pet. App. 62a (quoting *Board of Regents*, 468 U.S. at 101-102). There was nothing “tautological” about this reasoning in *Board of Regents* (Pet. 13), and there is nothing tautological about it here.

The foregoing also refutes petitioners’ related claim (Pet. 10) that the Ninth Circuit paid mere “lip service” to the connection between amateurism and “consumer demand,” i.e., to the link between the challenged NCAA rules and the procompetitive effect of increasing consumers’ desire to watch college sports. As just explained, the Ninth Circuit recognized that amateurism distinguishes college sports from professional sports in the eyes of consumers. That distinction drives consumer demand for the NCAA’s product. *See* Pet. App. 60a n.22 (quoting trial testimony that “the public has ... a sense of college sports that is different from professional [sports] and it’s at the bedrock of the popularity of college sports.” (alteration and ellipsis in original)).

In fact, contrary to petitioners’ assertion that the Ninth Circuit approved amateurism divorced from consumer demand, the link between the two pervades the court’s opinion. For example, the court affirmed the district court’s finding that “the NCAA’s current rules serve a procompetitive benefit by promoting ... ama-

teurism, which in turn *helps preserve consumer demand* for college sports.” Pet. App. 16a-17a (emphasis added); *accord* Pet. App. 47a (“The district court acknowledged that the NCAA’s current rules promote amateurism, which in turn plays a role in increasing consumer demand for college sports.”); Pet. App. 50a n.17 (same). Similarly, the court described the relevant question regarding less restrictive alternatives as whether “payments to student-athletes will be as effective in preserving consumer demand as the NCAA’s current amateurism policy.” Pet. App. 61a n.23. And the heart of the court’s rationale for overturning the district court’s approval of cash payments to student-athletes above cost of attendance was the court’s rejection of the notion that “a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand.” Pet. App. 56a (emphasis omitted). Other references to consumer demand permeate the court’s analysis. *See* Pet. App. 57a, 56a n.20, 62a n.25.

Ignoring all this, petitioners latch onto the Ninth Circuit’s occasional reference to “preserving amateurism.” Pet. 10 (quoting Pet. App. 55a). But as the discussion above shows, those references were simply shorthand for the Ninth Circuit’s conclusion that preserving amateurism preserves its legitimate procompetitive effects. Indeed, the sentences immediately before and after the one petitioners excerpt leave no doubt about this. The immediately preceding sentence refers to the district court’s finding that a “procompetitive purpose served by the NCAA’s current rules” was “preserving the popularity of the NCAA’s product by promoting ... amateurism.” Pet. App. 55a. And the sentence immediately after states: “We cannot agree

that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand.” *Id.* (emphasis omitted).

B. The Court of Appeals’ Procompetitive-Effects Ruling Is Correct And Does Not Conflict With Decisions Of This Court Or Other Courts

Once petitioners’ mischaracterization of the Ninth Circuit’s decision is recognized, the rest of their arguments quickly fall away. The holding and analysis that petitioners attack are entirely consistent with both established antitrust principles and decisions of this Court and other circuits.

1. As discussed, the relevant part of the Ninth Circuit’s analysis flowed directly from *Board of Regents*. Although petitioners—who relegate that on-point decision from this Court to the extreme tail end of their argument (Pet. 19-20)—dispute this, they notably do not discuss *any* of the relevant language from *Board of Regents*, which is recounted above and was quoted liberally by the court of appeals. Instead, petitioners quote (Pet. 20) three other portions of *Board of Regents*. None of the three undercuts the Ninth Circuit’s holding and analysis that petitioners challenge.

First, petitioners argue that this Court’s “decision to apply Rule of Reason rather than per se invalidity [in *Board of Regents*] was ‘not based ... on the fact that the NCAA is organized as a nonprofit entity, or on [this Court’s] respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics.’” Pet. 20 (ellipsis in original) (quoting *Board of Regents*, 468 U.S. at 100-101). But as this quotation indicates, that language from *Board of Regents*

related to the Court’s decision to use the rule of reason rather than a per se rule of invalidity—a decision based on the recognition that “league sports” are “an industry in which horizontal restraints on competition are essential if the product is to be available at all.” *Id.* at 100-101. The statement says nothing about what role amateurism should play *in the rule-of-reason analysis*. That role was addressed by other portions of the Court’s decision, which petitioners ignore.

Second, petitioners quote *Board of Regents’* statement that “good motives will not validate an otherwise anticompetitive practice.” 468 U.S. at 101 n.23, *quoted in* Pet. 20. But the NCAA has never argued that petitioners’ antitrust claim fails because of “good motives,” and the Ninth Circuit did not state or even suggest that its holding rested to any extent on the NCAA’s (or anyone else’s) motives. Petitioners do not even attempt to argue otherwise.

Third, petitioners say that *Board of Regents* “explained that ‘the NCAA’s historic role in ... amateur athletics’ did not water down the applicable antitrust standard.” Pet. 20 (ellipsis in original) (quoting 468 U.S. at 101). Again, however, nothing in the Ninth Circuit’s decision indicates that the court was “watering down” the relevant standards. Rather, the court of appeals—drawing on *Board of Regents*—held that: (1) the “applicable antitrust standard” for finding procompetitive effects (*id.*) was satisfied because the NCAA’s amateurism rules allow a distinct product to be brought to market and thus enhance consumer demand for that product, and (2) the “applicable antitrust standard” for a less restrictive alternative was not met by the district court’s remedy of cash payments above COA to student-athletes, because that would “vitate their ama-

teur status,” Pet. App. 57a, thereby eliminating the NCAA’s distinct product for consumers.

Petitioners’ challenge to the Ninth Circuit’s decision is thus inconsistent with—indeed foreclosed by—*Board of Regents*. It is also inconsistent with other decisions of this Court recognizing that increasing the choices available to consumers, as the amateurism rules challenged here do, is a legitimate procompetitive benefit. For example, this Court stated in one case that the “justifications” for restraints include “giv[ing] consumers more options.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007), cited in Pet. 14. The Court has also recognized more specifically that restraints adopted by joint ventures (like the NCAA) are procompetitive “where the agreement ... is necessary to market the product at all.” *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979). Hence, “[w]hen ‘restraints on competition are essential if the product is to be available at all,’ ... the agreement is likely to survive the Rule of Reason.” *American Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010) (quoting *Board of Regents*, 468 U.S. at 101). Nothing in the petition speaks to, let alone refutes, this central point as to why the Ninth Circuit’s decision was correct.

2. Petitioners assert that the relevant part of the decision below conflicts with other decisions of this Court and decisions of other circuits. That is wrong. The myriad cases petitioners plod through (Pet. 14-19) are all irrelevant for the simple reason that the supposed conflict with each of them rests on petitioners’ mischaracterization of the Ninth Circuit’s decision. Petitioners, that is, cite each of those decisions for the proposition that “the suppression of competition” is not a legitimate procompetitive effect. Pet. 15. But as explained, nothing in the Ninth Circuit’s decision conflicts

with that undisputed proposition (nor did the decision in any way rest on “expediency,” the “wisdom” of the Sherman Act, “financial disaster” for the NCAA, or any of the other phrases petitioners pull from various cases, *id.*). Rather, the court of appeals held that the legitimate procompetitive effect of the challenged amateurism rules is to widen consumer choice and spur consumer demand for the NCAA’s product by making that product—amateur college sports—both available and different from professional sports.

None of the cases petitioners cite casts doubt on that holding (not surprisingly given that it was required by *Board of Regents*). Nor do any of the cases—again, not surprisingly in light of *Board of Regents*—undermine the Ninth Circuit’s conclusion that the challenged NCAA rules do have the procompetitive effect of “widen[ing] consumer choice.” *Board of Regents*, 468 U.S. at 102. To the contrary, in one of the only two cases petitioners cite that even involved the NCAA, the Tenth Circuit reached the same conclusion as the Ninth Circuit here. Drawing on *Board of Regents*, the Tenth Circuit declared that “rules such as those forbidding payments to athletes” are “necessary for the product” of college basketball “to exist.” *Law v. NCAA*, 134 F.3d 1010, 1018 (10th Cir. 1998) (citing *Board of Regents*, 468 U.S. at 101-102). That court also explained that “making a new product available ... and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements.” *Id.* at 1023.⁵

⁵ The other case petitioners cite that involved the NCAA is the Tenth Circuit’s decision in *Board of Regents*. In particular, petitioners quote part of the Tenth Circuit’s reasoning for applying

In short, the Ninth Circuit’s holding regarding the procompetitive benefits of the challenged NCAA rules was correct, fully consistent with *Board of Regents* and other decisions of this Court, and not in conflict with any of the cases petitioners cite (or any other case of which the NCAA is aware).

II. PETITIONERS’ ARGUMENTS REGARDING THE NINTH CIRCUIT’S LESS-RESTRICTIVE-ALTERNATIVES ANALYSIS, WHICH ADDRESSED LIABILITY RATHER THAN REMEDY, LACK MERIT

Petitioners’ second overarching argument (Pet. 21-33) is that the Ninth Circuit’s remedial analysis was flawed because the court both improperly cabined the scope of district courts’ remedial authority and erroneously put the burden regarding the propriety of the injunction on petitioners rather than the NCAA.

Petitioners are again mischaracterizing the Ninth Circuit’s decision. The court of appeals never conducted a remedy-specific analysis—because no party asked it to do so. All of the language petitioners point to was part of the court’s *liability* analysis. And contrary to petitioners’ claims, the Ninth Circuit’s liability analysis as to the alternative of cash payments above cost of attendance (including the court’s allocation of the burden of persuasion) was correct and does not conflict with any decision of this Court or another circuit. Nor could petitioners have prevailed under the standard the court of appeals would have applied had it conducted a remedial analysis. This Court’s review is therefore unwarranted.

a per se rule of invalidity. *See* Pet. 17 (quoting *Board of Regents v. NCAA*, 707 F.2d 1147, 1154 (10th Cir. 1983)). That is a curious citation, given that this Court squarely rejected the Tenth Circuit’s decision to apply such a rule. *See* 468 U.S. at 98-103.

A. Petitioners' Challenges To The Ninth Circuit's Analysis Of The Above-COA Alternative Were Neither Pressed Nor Passed On Below And Rest On A Mischaracterization Of The Decision

Petitioners ask this Court to review the court of appeals' remedial analysis. But there was no distinct remedial analysis, again because no party sought one. The NCAA's Ninth Circuit briefs made no arguments about the injunction independent of the underlying judgment, i.e., no argument that the injunction was improper even if the district court's liability analysis were correct. Similarly, petitioners' brief offered no defense of the injunction independent of the liability finding. In particular, petitioners never offered the argument they advance now: that the entire injunction—including the requirement for the NCAA to allow cash payments *above* cost of attendance—could stand even if the Ninth Circuit concluded that the only violation of the Sherman Act was the NCAA's pre-2014 refusal to allow certain payments *below* COA.

The court of appeals decided the case as the parties presented it, on liability grounds. It concluded that the district court clearly erred in finding, at the third step of the rule-of-reason liability analysis, that a rule allowing cash payments to student-athletes above COA was a valid less restrictive alternative to the challenged NCAA rules. That this was part of the liability analysis is clear from the first sentence of the section of the court's opinion from which petitioners draw *all* of the language underlying their challenge to the court's supposed remedy analysis. *See* Pet. 3, 10-11, 29-30 (each quoting from between Pet. App. 51a and 63a). That sentence says: “The third step *in the Rule of Reason analysis* is whether there are substantially less restric-

tive alternatives to the NCAA’s current rules.” Pet. App. 51a (emphasis added); *see also* Pet. App. 63a (stating, “[b]y way of summation,” that “[t]he Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes” but “does not require more”). The rule of reason, as petitioners acknowledge (Pet. 21), is part of the liability analysis, not the remedial analysis.

In fact, petitioners conceded below that the language they now point to addressed liability rather than remedy. More specifically, whereas petitioners repeatedly tell this Court (Pet. 11, 22, 29, 30) that the Ninth Circuit’s phrase “*patently and inexplicably* stricter than ... necessary,” Pet. App. 54a, concerned remedy, they acknowledged in their rehearing petition that the language pertained to liability, *see* C.A. Reh’g Pet. 15 (“The majority’s requirement that a restraint must be ‘patently and inexplicably stricter than is necessary’ to incur liability upends circuit precedent and nullifies the rule of reason.” (emphasis and capitalization altered)).

Petitioners cannot reverse course now. As noted, they never argued below that the entire injunction could stand if the court held, as it ultimately did, that the only Sherman Act violation was the NCAA’s adoption of rules limiting payments for use of NILs below cost of attendance. And not surprisingly, the court said nothing about any such argument. Because the argument was not “pressed or passed upon below,” this Court should not consider it. *United States v. Williams*, 504 U.S. 36, 41 (1992); *see also, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (“Because this argument was not raised below, it is waived.”); *Pennell v. City of San Jose*, 485 U.S. 1, 11 n.5 (1988)

(declining to consider an argument “because it was raised for the first time in this Court”).

B. The Outcome Would Have Been The Same Had Petitioners Raised Their Argument Below

1. Waiver aside, petitioners’ argument does not warrant review because the Ninth Circuit’s decision would not have changed had it applied the remedial standard petitioners belatedly urge.

As petitioners say, an antitrust remedy should be “designed ‘to avoid a recurrence of the violation and to eliminate its consequences.’” Pet. 30 (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978)); see also Pet. 23-26. In other words, while an injunction may “go beyond the narrow limits of the proven violation,” *United States v. United States Gypsum Co.*, 340 U.S. 76, 90 (1950), it must be crafted to “cure the ill effects of the illegal conduct,” *id.* at 88-89; see also *National Soc’y of Prof’l Eng’rs*, 435 U.S. at 698 (“The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct.”).

Petitioners tellingly never even attempt to explain how the entire injunction could be upheld under this precedent given the Ninth Circuit’s liability analysis. They never explain, that is, how requiring the NCAA to allow cash payments to student-athletes *above* cost of attendance would be a remotely appropriate remedy for the NCAA’s having capped payments *below* COA. There is no explanation. The sole violation the Ninth Circuit affirmed is completely remedied by the portion of the injunction the court left in place, which requires the NCAA to allow schools to provide compensation for

NILs as a component of scholarships up to cost of attendance. That portion of the injunction eliminated any possibility that the violation would recur or that its effects would continue. Imposing the remainder of the injunction as a remedy for the lone violation upheld on appeal would have been utterly unreasonable.⁶

In fact, the court of appeals' opinion leaves no doubt that the court would have reached the same conclusion had it performed a remedial analysis. The Ninth Circuit "review[s] the district court's decision to grant a permanent injunction for abuse of discretion." *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014); accord *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). And "[a] district court abuses its discretion when it ... rests its decision on clearly erroneous findings of fact." *United States v. Ressam*, 679 F.3d 1069, 1086 (9th Cir. 2012) (en banc) (alteration in original) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009) (en banc)). Since the Ninth Circuit here held that the district court had clearly erred in finding that a rule allowing cash payments to student-athletes above cost of attendance was a valid less restrictive alternative, it necessarily would have held, under a remedial analysis, that the portion of the injunction requiring the NCAA to allow such payments—a portion that unquestionably rested on the clearly erroneous finding—was an abuse of discretion.

2. Petitioners cite (Pet. 32-33) two circuit cases that they claim conflict with the Ninth Circuit's "virtu-

⁶ The injunction here is prospective only, and the cash payments above COA would have been paid only to future student-athletes enrolling after a particular date. Pet. App. 183a. Those payments therefore could not have remedied any past violation.

ally as effective” standard. In reality, both cases (like this one) concerned liability under the rule of reason, rather than remedy. See *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 676 (7th Cir. 1992) (concluding that “the district court did not commit clear error in applying the ... Rule of Reason”); *United States v. Brown Univ.*, 5 F.3d 658, 678-679 (3d Cir. 1993) (referring twice to the rule of reason in the same paragraph from which petitioners excerpt the phrase “comparable benefits”); see also Pet. 33 (acknowledging that the Seventh Circuit decision concerned “liability against the NBA”). They therefore cannot constitute evidence of a circuit conflict about remedial standards. If instead petitioners cite the cases to challenge the Ninth Circuit’s liability standard, that argument is not properly before the Court because it is not within the scope of the second question presented, which is limited to the standard for “awarding relief” “after finding a violation ... under the Rule of Reason.” Pet. i (emphasis added). This Court “will not reach questions not fairly included in the petition.” *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); see also S. Ct. R. 14.1(a).

In any event, petitioners’ cases do not conflict with the Ninth Circuit’s liability analysis here. In *Chicago Professional Sports*, the Seventh Circuit never even discussed less restrictive alternatives; that phrase appears nowhere in the opinion. And in *Brown University*, the Third Circuit (citing Ninth Circuit precedent) declared that under the rule of reason, “the plaintiff ... bears the burden of proving that there exists a viable less restrictive alternative,” which is one that “can achieve the same benefits” as the challenged restraint. 5 F.3d at 679 (citing *Bhan v. NME Hosps., Inc.*, 909 F.2d 1404, 1413 (9th Cir. 1991)). Nothing in the Ninth

Circuit’s analysis of the above-COA remedy is inconsistent with these decisions.

C. Petitioners’ Burden Arguments Provide No Basis For Review

1. Petitioners argue (Pet. 23-28) that the Ninth Circuit departed from decisions of this Court and other circuits by erroneously imposing the burden regarding the validity of the district court’s injunction on them rather than on the NCAA. As explained, however, the court of appeals addressed whether there was an anti-trust violation, not the propriety of the remedy assuming there was a violation, because that is how the parties presented the appeal. The burden the court of appeals put on petitioners was thus the burden to show—as part of the liability analysis under the rule of reason—the existence of a valid less restrictive alternative to the challenged NCAA rules. The Ninth Circuit could hardly have been clearer about this, stating: “The third step in the Rule of Reason analysis is whether there are substantially less restrictive alternatives to the NCAA’s current rules [P]laintiffs bear the burden *at this step.*” Pet. App. 51a (emphasis added); *accord* Pet. App. 40a-41a (stating, as part of its “review [of] the plaintiffs’ Section 1 claim on the merits,” that a plaintiff has the burden at the third step of “the three-step framework of the Rule of Reason”). Petitioners cite nothing showing that the court of appeals put a burden on them regarding the propriety of the injunction.

Even if there were anything, review would still not be warranted. Petitioners’ assertion (Pet. 23) that under decisions of this Court and other circuits, “the *defendant* ... bears the burden of proving the district

court’s injunctive order exceeded its discretion and was unreasonable” is incorrect.⁷

This Court has long made clear that the party seeking injunctive relief—like the party seeking any other type of relief—is the one that bears the burden to show that the relief is warranted. Indeed, the Court has deemed this a “well-established principle[] of equity.” *eBay*, 547 U.S. at 391 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)). And Congress has provided that equitable principles govern requests for injunctions in antitrust actions brought by private plaintiffs. See 15 U.S.C. §26 (“Any person ... shall be entitled to ... injunctive relief [based on] ... a violation of the antitrust laws ... under the same conditions and principles as injunctive relief ... is granted by courts of equity[.]”).

The precedents petitioners cite (Pet. 23-25) address a different situation, where an adjudged antitrust violator returns to court seeking to modify an existing injunction. See *International Salt Co. v. United States*, 332 U.S. 392, 400-401 (1947) (“burden put upon” the “proven transgressor ... to bring any proper claims for relief to the court’s attention”); see also Pet. App. 183a (provision in permanent injunction allowing “[a]ny party [to] seek modification of this Order ... by written motion and for good cause”). Because in that situation

⁷ This quote from the petition, like other parts of petitioners’ argument, uses “burden” in describing an appellate court’s review of an injunction. But “burden” properly refers to factual issues, not standards of appellate review. As discussed immediately below, a party can have a burden *in the district court* to prove that an injunction is appropriate, but (save in the colloquial sense of the word) cannot have a “burden [on appeal] of proving the district court’s injunctive order ... was unreasonable.” Pet. 23.

the defendant is the party requesting relief, it is appropriate for the defendant to bear the burden.

That this is the proper reading of petitioners' authorities is particularly clear from the two other cases petitioners cite. In one, this Court stated—right after the sentence petitioners focus on—that the court of appeals had “specifically stated that” the defendant could “move the district court for modification of the decree.” *National Soc’y of Prof’l Eng’rs*, 435 U.S. at 698-699. And in the other, the Seventh Circuit stated, immediately before the sentence petitioners quote, that the injunction was “subject always to adaptation as events may shape the need, or as certain provisions become inappropriate.” *Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 486 (7th Cir. 1980) (per curiam) (citation and quotation marks omitted). None of those cases therefore helps petitioners, because here it was petitioners, not the NCAA, seeking relief in the district court. Under “well-established principles of equity,” *eBay*, 547 U.S. at 391, they had the burden.⁸

2. Petitioners alternatively claim (Pet. 26-28) that if the burden the Ninth Circuit imposed on them to show less restrictive alternatives did pertain to liability, that itself is improper and conflicts with decisions of other circuits. That argument is not properly before this Court for two reasons, and in any event it is incorrect.

Petitioners never argued below that they did not have the burden at the liability stage to prove the existence of a valid less restrictive alternative. To the

⁸ Petitioners suggest (Pet. 23) that the partial dissent below supports them on this point. That is wrong. The language petitioners quote (like the dissent more generally) discussed the *content* of petitioners' burden, not whether they bore one at all.

contrary, they told the district court that at the third step of a rule-of-reason analysis, “the burden ... shifts to the plaintiff to show ... a substantially less restrictive” alternative. Pltfs.’ Trial Br., Dist. Ct. Dkt. 172, at 3 (June 3, 2014). Similarly, their petition for rehearing en banc noted that “[t]he parties agreed in their [panel] briefing that Plaintiffs’ burden under *Tanaka v. University of Southern California*, 252 F.3d 1059 (9th Cir. 2001), was ... to show that any legitimate objectives can be achieved in a substantially less restrictive manner.” C.A. Reh’g Pet. 4; *see also id.* at 5 (acknowledging “Plaintiffs’ burden here in establishing a less restrictive alternative”); *id.* at 15 (similar). These concessions are fatal because “[a]bsent unusual circumstances ... [this Court] will not entertain arguments not made below.” *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015); *see also supra* pp.17-18 (citing cases).

The fact that the district court and court of appeals were both bound by circuit law that placed the burden on petitioners does not excuse petitioners’ waiver. Where “binding precedent for the panel below” exists, a party who did not “contest the issue in the case immediately at hand” can raise it in this Court *only* if “it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent.” *Williams*, 504 U.S. at 44-45, *cited in United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002). That is not the situation here; petitioners were not a party in any of the relevant prior Ninth Circuit decisions.

Petitioners’ argument is independently foreclosed because it falls outside the scope of the question presented. As noted, petitioners’ second question (like their first) is expressly limited to the remedial phase. *See* Pet. i (“Whether, after finding a violation ... under

the Rule of Reason....”). Arguments about burdens at the liability stage are not “fairly included” within that question. S. Ct. R. 14.1(a), *quoted in, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993).

Even if the argument were properly presented, petitioners are wrong that the Ninth Circuit’s allocation of the relevant burden conflicts with other court of appeals’ holdings. All three circuits petitioners cite have in fact held that a plaintiff bears the burden of showing less restrictive alternatives. *See, e.g., Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 308 (2d Cir. 2008) (if “the defendant offers ... evidence” of procompetitive effects, “the burden then shifts back to the plaintiff”); *Agnew v. NCAA*, 683 F.3d 328, 336 (7th Cir. 2012) (burden is on “plaintiff ... [to] show that the restraint in question is not reasonably necessary to achieve the procompetitive objective” proffered by a defendant); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (holding, in a section 2 Sherman Act case, that the “burden shifts back to the plaintiff to rebut” defendant’s “procompetitive justification”).

The (significantly older) decisions that petitioners cite do not hold otherwise. In two of the three, the remarks petitioners point to were dicta because the court held that the defendant had failed to meet its burden of establishing adequate procompetitive benefits. *See North Am. Soccer League v. NFL*, 670 F.2d 1249, 1261 (2d Cir. 1982); *Kreuzer v. American Acad. of Periodontology*, 735 F.2d 1479, 1494-1495 (D.C. Cir. 1984). And in the third case, the court “modif[ied] the rule of reason test” by placing a “heavy burden” on the defendant to account for the special context in which the case arose (medical ethical guidelines). *Wilk v. American Med. Ass’n*, 719 F.2d 207, 226-227 (7th Cir. 1983); *see*

also Wilk v. American Med. Ass'n, 895 F.2d 352, 362 (7th Cir. 1990) (“In the AMA’s first appeal, we modified the rule of reason” because “[w]e were persuaded that measuring ... reasonableness required a more flexible approach than the traditional rule of reason inquiry provided.”).

The Ninth Circuit did not impose a burden on petitioners regarding remedy, and its imposition of a burden regarding liability was correct, implicates no conflict, and is not properly before this Court. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GLENN D. POMERANTZ
 KELLY M. KLAUS
 MUNGER, TOLLES &
 OLSON LLP
 560 Mission St., 27th Floor
 San Francisco, CA 94105

GREGORY L. CURTNER
 ROBERT J. WIERENGA
 SCHIFF HARDIN LLP
 350 Main St., Suite 210
 Ann Arbor, MI 48104

SETH P. WAXMAN
Counsel of Record
 LEON GREENFIELD
 DANIEL S. VOLCHOK
 DAVID M. LEHN
 MATTHEW GUARNIERI
 ARI J. SAVITZKY
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 1875 Pennsylvania Ave. N.W.
 Washington, D.C. 20006
 (202) 663-6000
 seth.waxman@wilmerhale.com

MAY 2016